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Case No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

DELORES LAVERN WASHINGTON,
WILBERT ALBERGOTTIE,
CARLETHIA BENTLEY and
LAVERN PEARSON,
Petitioners

vs

HORACE CREEL,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Petitioners were deprived of their right to a fair trial in this diversity case when the district court instructed the jury on an issue of Georgia state tort law about which there was no evidence; to wit, the trial court instructed the jury on the "sudden emergency doctrine" where the evidence was that Respondent participated in the creation of the sudden peril and where Respondent had no real choice of conduct after he apprehended the danger that had been created.

LIST OF PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties to the proceedings in the United States Court of Appeals for the Eleventh Circuit and to the trial of this case in the United States District Court for the Southern District of Georgia, Brunswick Division. There were other parties defendant in this case at the district court level, but those Defendants were dismissed prior to the rendition of the judgment sought to be reviewed here and have no relevance to the issues presented to this Court.

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OPINIONS BELOW

The Order of the United States District Court for the Southern District of Georgia, Brunswick Division, denying Petitioners' Motion for New Trial was rendered in Case No. CV292-201, dated January 26, 1994 and is unpublished. It is reprinted in the Appendix included in this Petition, page A-1.

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's Order was rendered in Case No. 94-8175, dated April 5, 1995 and is unpublished. It is reprinted in the Appendix included in this Petition, page B-1.

The decision of the United States Court of Appeals for the Eleventh Circuit denying Petitioners' Petition for Rehearing and denying Petitioners' Suggestion of Rehearing En Banc was rendered in Case No. 94-8175, dated July 13, 1995 and is unpublished. It is reprinted in the Appendix included in this Petition, page C-1.

STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The decision of the United States Court of Appeals for the Eleventh Circuit sought to be reviewed was entered on April 5, 1995. Petitioners' Petition for Rehearing was denied on July 13, 1995. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1354(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED

O.C.G.A. §40-6-49(a)

O.C.G.A. §40-6-180

O.C.G.A. §40-8-7

O.C.G.A. §40-8-8

O.C.G.A. §40-8-50

O.C.G.A. §40-8-53

O.C.G.A. §40-8-54

These provisions are reprinted verbatim in the Appendix included in this Petition, commencing on page D-1.

STATEMENT OF THE CASE

Statement of Proceedings Below

On July 30, 1992, Petitioners, individually and as representatives of the estates of Judge Booker T. Washington and Marie S. Washington, filed this diversity action in the United States District Court for the Southern District of Georgia. (R1-1) They alleged that the named defendants were liable for the injuries to and deaths of their parents, as a result of a collision on August 19, 1991. When the case came to trial, the only defendant was Horace Creel. Jury trial commenced December 15, 1993 before the Honorable Anthony A. Alaimo. At the conclusion of the evidence, Petitioners moved for directed verdict, which was overruled. (R9-13) Creel requested the Court charge the jury on the issue of sudden emergency.

Petitioners objected and the objection was overruled. (R9-38,39) On December 21, 1993, a verdict was returned for Creel. (R5-180) Judgment was entered on December 22, 1993. (R5-182) On December 30, 1993, Petitioners moved for Judgment Notwithstanding The Verdict or, in the alternative, for New Trial. Petitioners contended the verdict was not supported by the evidence and the Court erred in giving the sudden emergency charge. (R5-184) On January 26, 1994, the motions were denied. (R5-187) (See Appendix A).

Petitioners timely filed a Notice of Appeal. (R5-188) On July 25, 1994, Petitioners filed their brief in the United States Court of Appeals for the Eleventh Circuit, Creel responded and Petitioners replied. Petitioners requested oral argument, but that request was not granted and, on April 5, 1995, a panel of the Eleventh Circuit Court of Appeals affirmed the lower court. (See Appendix B). On April 26, 1995, Petitioners timely filed a Petition for Rehearing and a Suggestion of Rehearing En Banc in the United States Court of Appeals for the Eleventh Circuit. On July 13, 1995, the Eleventh Circuit denied the Petition for Rehearing and the Suggestion of Rehearing En Banc. (See Appendix C).

Statement of the Facts

On August 19, 1991, Booker T. and Marie Washington were travelling east on Georgia Highway 38. (R7-11,12,22,23) The road was straight. (R7-16) The Washingtons were travelling

under the speed limit. (R7-27) At the same time, a caravan of three trucks was travelling in the opposite direction down that same road. (R7-12,78) Those trucks were being driven by Frances Manning ("F. Manning"), Horace Creel ("Creel") and Gary Manning ("G. Manning"). (R7-78) Colin Foster ("Foster") was a passenger in the G. Manning truck. (R9-5) G. Manning, Creel and Foster worked for F. Manning in the logging business. (R7-72) On August 19, 1991, the men finished cutting wood at one place and were moving to cut a new tract. (R7-80, R9-3,4)

F. Manning knew the location of the new job site, because he had already been there. He knew the area well as he had been in the business there for twenty years. (R7-77) The men were to travel to the new site in their usual custom. When F. Manning took his crew to a new location, he led the way. If he was far ahead of the crew when he got to the location, he would stop at the side of the road; otherwise, he would stop on the road where the other drivers were to turn. (R7-80) Creel left the old site first. (R7-77) He was driving an eighteen-wheel Mack truck, pulling a lowboy trailer with a "Franklin logger skidder," to cut down the timber. (R7-4; R8-131; R9-4) Creel's tractor-trailer itself weighed 30,000 pounds and the skidder weighed another 20,000 pounds. (R7-19,20; R7-74; R8-133) F. Manning drove out second and G. Manning drove out third, with Foster in the passenger seat. (R7-78, 4, 5) Since F. Manning knew the location of the new site and Creel

didn't, and since the men knew they were to be following F. Manning, F. Manning passed Creel so he would be the lead vehicle to show them where to turn. (R7-26) Both Creel and F. Manning were travelling at 45 mph. (R7-83; R8-137) The caravan was to turn off of Georgia Highway 38 and on to County Road 108, which was clearly marked. (R7-29) The caravan passed over a small hill one-tenth of a mile (528 feet) before the intersection. (R7-21) Travelling west, Creel had a clear view from the top of the hill for approximately 1,000 feet to the intersection. (R8-128,129)

As he approached the intersection with County Road 108, F. Manning drove his truck to a stop in order to turn left. (R9-10) Creel tried to stop his vehicle by hitting his air brakes at least twice. (R7-78, 79; R7-100) He couldn't stop in time, and crashed into the back of F. Manning's truck, pushing it into the oncoming lane. (R9-10; R7-78) At that moment, the Washingtons were approaching the intersection of County Road 108 and, unavoidably, they crashed into the F. Manning vehicle which had been thrown suddenly in their path. (R7-7) F. Manning was killed in the accident. (R7-74) Creel was not seriously injured and remained at the scene of the accident. (R7-8) The Washingtons were seriously injured. Marie Washington died on August 20, 1991 and Judge Washington died on August 27, 1991. (R7-151; R8-3,4,76)

The collision was investigated by Trooper Craig Pittman. (R7-3) He talked to Creel immediately after the collision and twenty-four hours later. He testified at trial that Creel couldn't remember what had happened. (R7-8,9) Pittman called the Georgia Public Service Commission ("PSC") and asked that they send a representative to the scene to check Creel's brakes. (R7-10,17,18) The PSC sent Robert Johns, who inspected Creel's truck. He concluded that Creel's brakes were in violation of both PSC regulations and United States Department of Transportation ("DOT") regulations. If he had inspected the truck prior to the accident, he would have taken it off the road until the brakes were repaired. (R7-43, 44) Specifically, there were eight brakes on the truck; six on the tractor and two on the trailer. (R7-44,48) Four of these eight brakes were in violation of the regulations, meaning that 50% of the brakes on the Creel truck were defective. (R7-51,52) If the brakes had been 100% in compliance with the regulations, Creel would have been able to stop 25 to 30% faster.

The three eye-witnesses testified. Creel admitted he was driving a 25,000 pound tractor with a 25,000 pound tree cutter on the trailer. (R7-89) He knew he could not stop a 50,000 pound vehicle quickly. (R7-90) He acknowledged his obligation to drive safe equipment. (R7-89,90) Creel testified that, on the Friday before the accident, he knew that the brakes needed to be adjusted before he could use the truck

again on Monday. When he got into the truck on Monday, he did not check to see if the brakes had been fixed. (R7-91,92) Creel also knew the speedometer wasn't working on the day of the accident. (R7-92) He admitted it is difficult to judge speed without a speedometer. (R7-92,93)

Creel could not say how long it was after F. Manning passed him that the wreck occurred, how fast he or F. Manning was going, or how far F. Manning was in front of him when Creel first applied his brakes. (R7-94,97-99) All Creel knew was that it happened "quick." (R7-99,100) Creel admitted that he tried to apply his brakes, probably twice. (R7-100)

G. Manning, who was driving the vehicle behind Creel, also testified. He remembered that F. Manning passed Creel three quarters of a mile before the intersection with County Road 108. (R7-78) He testified that F. Manning did not pull right around Creel, slamming on his brakes. (R7-78) He also testified he knew that Creel was attempting to stop because he could see the brake lights on the lowboy and could hear the airbrakes. It appeared that Creel tried at least twice to engage the brakes. (R7-78,79) All Creel told G. Manning was "[i]t happened so quick." Creel could not explain why he couldn't stop and he did not say that F. Manning pulled in front of him and came to a sudden stop. (R7-79) The third and only remaining survivor to the collision was Colin Foster. He testified that the accident occurred a minute and a half after F.

Manning passed Creel and that F. Manning was stopped when Creel hit him. (R9-10)

Charles E. Benedict testified as an expert accident reconstructionist for Petitioners. It was Dr. Benedict's opinion that Creel caused the accident by following too closely behind F. Manning, with inadequate brakes. (R8-114) It was his further opinion that Creel should not have been travelling at a speed of 45 to 50 mph. considering the load he was carrying and how out-of-adjustment his brakes were on that day. (R8-115, 116) One of the things upon which he based his opinion was the position of F. Manning's vehicle at the time of the collision. (R8-117) The F. Manning vehicle was on the right side of the roadway with the right rear tire sitting on the edge of the roadway. (R8-125) Creel hit the rear of the F. Manning truck slightly to the right. (R8-120, 121) When Creel hit the F. Manning truck, absent some steering input from the F. Manning vehicle, the Manning truck would have gone straight down the road. Instead, the F. Manning vehicle went violently to the left, almost at a right angle. (R8-121) This means that the front wheels of the F. Manning vehicle were turned sharply to the left at the time of the impact. (R8-117,126,127) The significance of this is that F. Manning had to be stopped at the intersection. If he wasn't, he would have been driving into the path of the Washingtons prior to impact. And F. Manning could not have stopped abruptly: He had to have had time to stop completely

to get his wheels turned to the left before Creel ran into him. (R8-130)

It was Benedict's opinion that Creel had been travelling approximately 45 mph. down the highway and had reduced his speed only slightly before impact. (R8-137) Dr. Benedict testified that, if Creel had adequate brakes or had been travelling ten miles an hour slower, the accident would not have happened. (R8-139,140) If Creel's brakes had been working, it would have taken him longer to strike F. Manning, and the Washington vehicle would already have been safely past F. Manning. In addition, if Creel's brakes had been working, he would have had time to steer further to the right, completely missing F. Manning. (R8-138) No expert was presented by the defense. In spite of this evidence and over the objection of Petitioners, the Court charged the jury on the doctrine of sudden emergency. (R9-38, 39) A verdict was returned for Creel. (R5-180)

Statement of Federal Jurisdiction

Petitioners seek review of a judgment of the United States Court of Appeals for the Eleventh Circuit. The basis for federal jurisdiction in the court of first instance, the United States District Court for the Southern District of Georgia, Brunswick Division, was 28 U.S.C. §1332(a).

ARGUMENT AND CITATIONS OF AUTHORITY

A grave injustice has been done to the Petitioners, which requires the attention of this Court. At the conclusion of their trial before a district court judge, the jury was instructed on the defense of "sudden emergency," despite the fact that there was no evidence introduced during the trial of the cause which would substantiate that jury instruction. The instruction confused and misled the jury; indeed, it gave the defendant a defense to which he was not entitled. This enabled the jury to render an improper and illegal verdict for the Respondent, denying damages to the children of Booker T. and Marie Washington. The district court compounded its error when it denied Petitioners' Motion for New Trial. The Eleventh Circuit's affirmance, without hearing, of the trial court's decision sanctioned the lower court's inexplicable departure from the accepted and usual course of judicial proceedings. This Court should exercise its supervisory power to rectify these wrongs. U.S. Supreme Court Rule 10. It is appropriate to petition this Court for a writ of certiorari where the petitioner claims that the trial was unfair because the jury was charged on an issue not supported by the evidence. Pinkus v. United States, 436 U.S. 293 (1978).

Petitioners were deprived of their right to a fair trial in this case when the jury was instructed on a proposition of law about which there was no evidence. "Trial by jury as

guaranteed by the Constitution of the United States and of the several States presupposes a jury under proper guidance of a disinterested and competent trial judge. Wilkerson v. McCarthy, 336 U.S. 53, 64 (1949).

> In a trial by jury in a Federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Story, in United States v. Battiste (C.C.) 2 Sumn. 240, 243, Fed. Cas. No. 14, 545: 'It is the duty of the court to instruct the jury as to the law; and it is the duty of the jury to follow the law, as it is laid down by the court.'

Herron v. Southern Pacific Co., 283 U.S. 91, 95 (1931). Our Constitution promises not merely a trial before individuals sworn under oath to enter judgment in a case, but a trial "in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and. . . to set aside their verdict if in his opinion it is against the law or the evidence." Capital Traction Co. v. Hof, 174 U.S. 1, 13, 14 (1899).

In the instant diversity case, in order for the district court properly to guide and advise the jury in its deliberations, it had a duty to apply fairly the tort law of the State of Georgia. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938); see

also Vandenbark v. Owens-Illinois Glass Co., 311 U.S. 538 (1941). The trial court abandoned that duty when it gave a sudden emergency charge in this case where the evidence did not support that charge under Georgia state law. It is improper for a court to instruct the jury on an issue of law about which there is no evidence. Collins v. Metropolitan Life Ins. Co., 729 F.2d 1402 (11th Cir. 1984); Lyle v. Bentley, 406 F.2d 325 (5th Cir. 1969).[1] It further abandoned that duty when it failed to grant Petitioners' Motion for New Trial since the improper jury instruction confused and misled the jury, resulting in a trial that was not fair to Petitioners. See Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940). The Eleventh Circuit sanctioned the abandonment when it issued its affirmance and its denial of Petitioners' Petition for Rehearing. A reversal was mandated because the instructions showed a "tendency to confuse or mislead the jury regarding applicable principles of law." Collins v. Metropolitan Life Ins. Co., supra at 1405. Clearly, had this case been brought in the Georgia state court system, the charge would not have been given. There should be no less justice because this case involves citizens of different states.

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1 The Eleventh Circuit in the en banc decision of Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981), adopted as precedent the decisions of the former Fifth Circuit decided prior to October 1, 1981.

Over the objection of Petitioners (R9-38,39), the lower court charged the jury as follows:

> I charge you that when a person finds himself confronted with a sudden emergency which was not brought about by his own negligence or want of care, that such a person has a legal right to do what appears to him at the time he should do, so long as he acts in a reasonably prudent manner as any other person would have done under similar circumstances to avoid an injury. If he does so act, then he will not be deemed to have been negligent, even though it might afterwards, by hindsight, appear that some other course of action would have been better.
>
> If you find from the preponderance of the evidence, therefore, that the defendant was following a vehicle on the highway at a proper distance while maintaining a proper rate of speed and that the vehicle in front of him came to a sudden stop, thereby causing a sudden emergency, and that the emergency was not brought about by the defendant's negligence and that thereafter the defendant acted in a prudent manner as a reasonable person would have done under the circumstances, then he would not be negligent and your verdict would be for the defendant.

(R9-30-31) In Georgia,

> The defense of emergency is not available unless the evidence shows that there has been a sudden peril caused by circumstances in which the defendant did not participate and which offered him a choice of conduct without time for thought so that negligence in his choice might be attributed not to lack of care but to lack of time to assess the situation.

Thomas v. Shahan, 213 Ga. App. 484, 444 S.E.2d 851 (1994); Robinson v. MARTA, 197 Ga. App. 628, 399 S.E.2d 252, 254 (1990) (emphasis supplied). In the instant case, Creel participated in the creation of the sudden peril and he had no real choice of conduct after he apprehended the danger that had been created. Since he could not show the requisite factors, there was no conduct to which the sudden emergency doctrine applied and the doctrine was inapplicable. Davis v. Calhoun, 128 Ga. App. 104, 195 S.E.2d 759 (1973).

A. Creel Participated In The Emergency

Creel was not entitled to the jury charge on the sudden emergency doctrine because he participated in the circumstances creating the peril.

> **No one is entitled to relief from the consequences of neglecting to exercise ordinary care for his own protection and safety because failure to do so arose from an emergency brought about by his own act involuntarily placing himself in a situation of peril.**

Johnston v. Woody, 148 Ga. App. 152, 250 S.E.2d 873, 875 (1978).

In Johnston v. Woody, supra, Johnston was driving on I-285, came upon a vehicle in the lane in front of him and tried to apply his brakes. His brakes didn't work and he collided with the car. Johnston was propelled into oncoming traffic and hit the vehicle driven by Woody. Woody sued Johnston and the trial court refused to charge the jury on sudden emergency as requested by Johnston. The jury returned a verdict for Woody and Johnston appealed. The Court of Appeals upheld the lower court's decision that the doctrine of sudden emergency didn't apply because it appeared that the dangerous situation would not have existed but for Johnson's excessive speed, despite the unexpected failure of his brakes.

In Thomas v. Shahan, 213 Ga. App. 484, 444 S.E.2d 851 (1994), Thomas testified she was travelling north when Shahan's car, travelling south, collided with her car in her lane. Thomas and her passenger testified that the first time they saw Shahan's car, it was in their lane. The investigating officer concluded

that the cause of the accident was that Shahan's car was on the wrong side of the road. Shahan had no memory of the accident. The trial court charged the jury on sudden emergency. The appellate court found that the charge was not authorized by the evidence because any emergency which existed was attributable to Shahan.

Cases from other jurisdictions whose law on sudden emergency is substantially similar to that of Georgia are instructive. In Henthorn v. Long, 146 W.Va. 636, 122 S.E.2d 186 (1961), Henthorn's car was struck in the rear by a truck operated by Long. Long testified that he tried to stop his truck, but his brakes failed. The court gave a sudden emergency charge and the jury returned a defense verdict. The appellate court reversed, stating that the jury could not have reasonably determined that, if there was an emergency, it was not the fault of the defendant since the defendant knew, before he embarked on his trip, that his brakes were defective.

In Taylor v. Bair, 414 F.2d 815 (5th Cir. 1969), the defendant driver struck two pedestrians. She testified she had been distracted and, when she looked back, the victims were in front of her. The trial court directed a verdict for the defendant and she sought to justify that verdict by alleging the existence of a sudden emergency as defined in Texas. The Eleventh Circuit disagreed:

> The doctrine is, therefore, only applicable where the one seeking its application was free from negligence before the emergency arose. (citations omitted) Were this not the rule, once the period of peril incepted, all prior acts creating the peril would evanesce even though the one seeking to apply the doctrine was the catalyst for the entire tragedy.

Id. at 820.

Applying the law to these facts, it is clear that Creel participated in the emergency and was not entitled to the sudden emergency charge. Creel knew his brakes were defective. (R7-91,92) He knew his vehicle weighed over 50,000 pounds and it would be hard to stop. (R7-89,90) His brakes were so defective he didn't even leave skid marks at the scene of the accident although he tried to apply the brakes twice. (R7-70,100) Driving without functioning brakes is a per se violation of Georgia law. O.C.G.A. §40-8-50, §40-8-53, §40-8-54. Creel knew that he was driving without a functioning speedometer and that he was not capable of judging his own speed. (R7-92,93) Driving without a functioning speedometer is a per se violation of Georgia law. O.C.G.A. §40-8-8. In fact, it is illegal in Georgia to operate a vehicle on the highway unless the equipment on that vehicle is in good working order and the vehicle is in such safe mechanical condition as not to endanger any person on the highway. O.C.G.A. §40-8-7. Operating a vehicle that is not in good working order is a

misdemeanor. Id. As it turns out, Creel was travelling between 45 and 50 mph, which was too fast for the conditions. (R8-116; R7-83) Driving a vehicle too fast for conditions is a per se violation of Georgia law. O.C.G.A. §40-6-180. And as it also turns out, Creel was following too closely for the conditions. (R8-116) Following too closely for conditions is also a per se violation of Georgia law. O.C.G.A. §40-6-49(a).

Creel didn't know where to turn to cut the new tract of timber. He knew F. Manning would be passing him to direct him to the new location. (R7-26) As soon as F. Manning passed, he should have slowed his vehicle. It is not reasonable to expect that F. Manning waited until the caravan was nearly at County Road 108 to pass Creel: F. Manning knew where to turn and he was familiar with the area, having worked there for twenty years. (R7-77) Both G. Manning and Foster testified that F. Manning passed Creel three quarters of a mile or a minute and a half before the turn. (R7-78; R9-10) Creel just said, "it happened quick." (R7-94,100)

The expert testimony was that Creel caused the accident by following too closely behind F. Manning, with inadequate brakes and at a speed too fast for conditions. (R8-114,116) Had his brakes been in complete compliance with the PSC and DOT regulations, Creel would have been able to stop his vehicle 25 to 30% faster. (R7-64,65) In that event, he would have had time to steer further to the right, completely missing

the F. Manning vehicle or, at least, would have impacted the F. Manning vehicle later, after the Washington vehicle had passed the intersection. (R8-139). There was no evidence to the contrary presented by Respondent. Accordingly, it is clear from the evidence that Creel participated in the circumstances creating the sudden peril and was not entitled to the sudden emergency charge. To hold otherwise would establish a rule that every negligent actor is entitled to the sudden emergency charge because there is, ultimately, an "emergency" immediately preceding each collision. See Taylor v. Bair, supra.

B. Creel Had No Choice Of Conduct

In addition, the doctrine of sudden emergency doesn't apply since Creel had no choice of conduct after apprehending the danger.

> The doctrine of sudden emergency refers only to those acts which occur immediately following the apprehension of danger or crisis and before there is time for careful reflection. (citation omitted). This requires that the person confronted by the emergency have the opportunity and exercise a choice in alternative courses of action. In the absence of such factors, there can be no conduct to which to apply the standard, and the doctrine is inapplicable.

Johnston v. Woody, 148 Ga. App. 152, 250 S.E.2d 873, 875 (1978).

Thomas v. Stairs, 215 Ga. App. 288, 450 S.E.2d 326 (1994), is on point. In Thomas, the defendant collided with the car in front of him, causing that car to collide with the plaintiff. The defendant argued that the car in front of him stopped suddenly, that he hit his brakes and that he was unable to stop his vehicle without striking the car in front of him. At the defendant's request, the trial court charged the jury on sudden emergency. The jury returned a defense verdict. The Court of Appeals reversed, ruling it was harmful error to give the sudden emergency charge. The Court reiterated that the sudden emergency doctrine "requires that the person confronted by the emergency have the opportunity to exercise one of several reasonable alternative courses of action. In the absence of such factors, there can be no conduct to which to apply the standard and the doctrine is inapplicable." Id. Applying that law to the facts in Thomas, the Court found the evidence did not support the charge because the defendant "did not testify that he considered any course of conduct other than braking." Id. Because the trial court was presented with no affirmative testimony that the defendant considered an alternative course of conduct, the Court of Appeals ruled it was error to give the sudden emergency charge. "The instruction gave defendant a defense to which he was not entitled and the error was therefore not harmless." Id.

The facts of the instant case are identical to those in Thomas. Creel urged that the truck ahead of him stopped short, that he couldn't stop his vehicle in time and that he collided with the truck ahead of him, causing it to collide with the Washington vehicle. Creel testified only that he applied his brakes and that the accident happened "quick." (R7-98-100) Because Creel did not testify that he considered any course of conduct other than braking, he was not entitled to the sudden emergency charge. The sudden emergency instruction gave Creel a defense to which he was not entitled, resulting in harmful error.

Davis v. Calhoun, 128 Ga. App. 104, 195 S.E.2d 759 (1973) is also analogous. In Davis, the defendant topped an incline as the road made a curve. Vehicles were stopped in the roadway ahead. The distance from the top of the rise to the vehicles was between 140 and 400 feet (much closer than in the instant case). The defendant applied his brakes, attempting to stop his car and also to turn it to the right. He was unsuccessful and collided with the vehicles. The trial court's refusal to charge on sudden emergency was affirmed. The Court reasoned that the defendant had no real choice of conduct after he realized the situation which would make the doctrine of sudden emergency applicable. He couldn't pass the vehicles on the left because of traffic and he did not contend that he had

a choice between attempting to stop and attempting to clear around the shoulder to the right. The Court stated that:

> The real thrust of his argument was not that he made an emergency choice when confronted by a sudden danger, but rather that he was not negligent in any particular and the collision, as to him, was an accident or due to the negligence of others.

195 S.E.2d at 761. See also Howard v. Jones, 187 Ga. App. 756, 371 S.E.2d 196 (1988).

In the instant case, Creel did not contend that he had any choice of conduct after apprehending the peril, nor did the evidence presented show that such a choice existed. Creel could not have proceeded in the left lane because the Washingtons' vehicle was travelling east in that lane. Creel applied his brakes and attempted to swerve to the right, but could not avoid colliding with F. Manning. (R7-78,79) All Creel could testify to was that it "happened quick." (R7-94,100) As was the case in Davis, supra, the real thrust of Creel's argument was not that he made an emergency choice when he saw the F. Manning vehicle stopped ahead, but rather that he was not negligent and that the collision was due to the negligence of F. Manning, stopping short. Thus, the instruction on sudden emergency was improper and created harmful error.

Since the evidence did not warrant the sudden

emergency instruction, it was improper of the trial court to instruct the jury on that issue of law. Collins v. Metropolitan Life Ins. Co., 729 F.2d 1402 (1984); Lyle v. Bentley, 406 F.2d 325 (5th Cir. 1969). Because the jury instruction confused and misled the jury, the trial was unfair and a new trial should have been granted by the district court. See Montgomery Ward & Co. v. Duncan, 311 U.S. 243 (1940). The Court of Appeals should have reversed the trial court because, on appeal, it should have been "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." Somer v. Johnson, 704 F.2d 1473, 1477 (11th Cir. 1983), quoting Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir. 1981).

Justice requires that this Court consider this case in order to rectify the injustice done to these Petitioners. To hold otherwise is to allow a federal court to ignore the clear authority of the state whose law it is bound to apply and to sanction a departure from the well-known rule that all jury charges must be warranted by the evidence.

CONCLUSION

This Court should grant Petitioners' Petition for Writ of Certiorari to the Eleventh Circuit.

Respectfully submitted,

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APPENDIX A

ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF GEORGIA, BRUNSWICK DIVISION

FILED
U.S. DIST COURT
BRUNSWICK DIV

JAN 26 3 28 PM '94
CLERK /s/ S. Taylor
SO. DIST. OF GA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

DELORES LAVERN WASHINGTON WILBERT ALBERGOTTIE, CARLETHIA BENTLY and LAVERNE PEARSONS,	:	CIVIL ACTION
Plaintiffs,	:	
v.	:	
HORACE CREEL,	:	
Defendant.	:	NO. CV292-201

ORDER

The plaintiffs have made a Motion for Judgment Notwithstanding the Verdict, or, in the alternative, a Motion for a New Trial, arguing: (1) that the verdict in favor of Defendant is not supported by the evidence; and (2) that the Court erred in instructing the jury on the "sudden emergency" rule, because the defense of "sudden emergency" is not available when a defendant created the sudden emergency, in whole or in part.

The Court, having reviewed Briefs of counsel as well as the trial record, hereby concludes: (1) that the verdict by the

jury was in fact supported by the evidence; and (2) that the instruction on the "sudden emergency" rule was properly given to the jury, since the determination of whether the Defendant created the emergency conditions is an issue of fact and the jury was so instructed.

Therefore, Plaintiffs' Motion for Judgment Notwithstanding the Verdict, or, in the alternative, Motion for New Trial is DENIED.

SO ORDERED, this 26th day of January, 1994.

/s/

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

APPENDIX B

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AFFIRMING DISTRICT COURT ORDER

B-1

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 94-8175
Non-Argument Calendar

D.C. Docket No. CV292-201

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
APR - 5 1995
MIGUEL J. CORTEZ
CLERK

DELORES LAVERN WASHINGTON,
Individually and as Personal
Representative of the Estates
of Booker T. Washington and
Marie S. Washington and
WILBERT ALBERGOTTIE,
CARLETHIA BENTLY and
LAVERNE PERSONS,

Plaintiffs- Appellants,

versus

HORACE CREEL,

Defendant,
Third-party Plaintiff,
Appellee,

MANNING LUMBER COMPANY,
et al.,

Defendants.

B-2

Appeal from the United States District Court
for the Southern District of Georgia

(April 5, 1995)

Before COX, BIRCH, and BLACK, Circuit Judges.

PER CURIAM: AFFIRMED. See 11th Cir. Rule 36-1.

Entered: April 5, 1995
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNall
Deputy Clerk

ISSUED AS MANDATE: 7/21/95

APPENDIX C

DECISION BY THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

C-1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-8175

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JUL 13 1995
MIGUEL J. CORTEZ
CLERK

DELORES LAVERN WASHINGTON, Individually and as Personal Representative of the Estates of Booker T. Washington and Marie S. Washington and WILBERT ALBERGOTTIE, CARLETHIA BENTLY and LAVERNE PERSONS,

Plaintiffs-Appellants,

versus

HORACE CREEL,

Defendant,
Third-Party Plaintiff,
Appellee,

MANNING LUMBER COMPANY, et al.,

Defendants.

On appeal from the United States District Court for the Southern District of Georgia

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ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: COX, BIRCH and BLACK, Circuit Judges

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED>

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/_____

UNITED STATES CIRCUIT JUDGE

ORD-42
(9/91)

APPENDIX D

GEORGIA STATUTES

40-6-49. Following too closely.

(a) The driver of a motor vehicle shall not follow another vehicle more closely than is reasonable and prudent, having due regard for the speed of such vehicles and the traffic upon and the condition of the highway....

(Ga. L. 1953, Nov.-Dec. Sess., p.556, §63; Code 1933; §68A-310, enacted by Ga. L. 1974, p. 633, §1; Ga. L. 1990, p. 2048, §5.)

40-6-180. Basic rules.

No person shall drive a vehicle at a speed greater than is reasonable and prudent under the conditions and having regard for the actual and potential hazards then existing. Consistently with the foregoing, every person shall drive at a reasonable and prudent speed when approaching and crossing an intersection or railroad grade crossing, when approaching and going around a curve, when approaching and traversing a hill crest, when traveling upon any narrow or winding roadway, and when special hazards exist with respect to pedestrians or other traffic or by reason of weather or highway conditions.

(Ga. L. 1953, Nov.-Dec. Sess., p. 556, §48; Code 1933; §68A-801, enacted by Ga. L. 1975, p. 1582, §1; Ga. L. 1990, p. 2048, §5.)

40-8-7. Driving unsafe or improperly equipped vehicle; violations of article; vehicle inspection by law enforcement officer without warrant.

(a) No person shall drive or move on any highway any motor vehicle, trailer, semitrailer, or pole trailer, or any combination thereof, unless the equipment upon any and every such vehicle is in good working order and adjustment as required in this chapter and the vehicle is in such safe mechanical condition as not to endanger the driver or other occupant or any person upon the highway.

(b) It is a misdemeanor for any person to drive or move, or for the owner to cause or knowingly permit to be driven or moved on any street or highway, any vehicle or combination of vehicles;

(1) Which is in such unsafe condition as to endanger any person;

(2) Which does not contain those parts or is not at all times equipped with such lights and other equipment in proper condition and adjustment as required in this chapter; or

(3) Which is equipped in any manner in violation of this chapter;

(c) It is also a misdemeanor for any person to do any act forbidden or fail to perform any act required under this chapter.

(d) Any vehicle suspected of being operated in violation of this article may be the subject of an inspection conducted by any law enforcement officer who has reason to believe such violation is occurring, without the necessity of obtaining a warrant to permit such inspection.

(Ga. L. 1953, Nov.-Dec. Sess., p. 556, §§ 102, 123; Ga. L. 1963, p. 333, §1; Code 1933, §68E-107, enacted by Ga. L. 1982, p. 165, §4; Code 1981, §40-8-7, enacted by Ga. L. 1982, p. 165, §10).

40-8-8. Speedometer.

Every motor vehicle operated upon a public street or highway shall be equipped with a speedometer in good working order.

(Code 1933, §68E-108, enacted by Ga. L. 1982, p. 165, §4; Code 1981, §40-8-8, enacted by Ga. L. 1982, p. 165, §10.)

40-8-50. Brakes required.

(a) Every motor vehicle, other than a motorcycle or motor driven cycle, when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels. If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure on any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two wheels.

(b) Every motorcycle and motor driven cycle manufactured after January 1, 1974, when operated upon a highway, shall be equipped with at least two brakes which may be operated by hand or foot.

(c) Every trailer or semitrailer of 2,500 pounds gross weight or more shall be equipped with brakes on all wheels. Any farm trailer with two or more wheels, pulled from a tongue, used in or operated for farm purposes, including transporting fertilizer and agricultural materials to the farm, shall not be required to have an independent braking system thereon, provided such farm trailer shall not weight over 4,000 pounds when empty.

(Ga. L. 1953, Nov.-Dec. Sess., p. 556, §115; Ga. L. 1965, p. 406, §1; Ga. L. 1970, p. 438, §1; Ga. L. 1974, p. 422, §1; Code 1933, §68E-301, enacted by Ga. L. 1982, p. 165, §4; Code 1981; §40-8-50, enacted by Ga. L. 1982, p. 165, §10.)

40-8-53. Performance ability.

Every motor vehicle or combination of motor drawn vehicles shall be capable at all times and under all conditions of loading of being stopped on a dry, smooth, level road free from loose material, upon application of the service (foot) brake within the distances specified below or shall be capable of being decelerated at a sustained rate corresponding to these distances.

	Feet to stop From 20 miles Per Hour	Deceleration in Feet Per Second Per Hour
Vehicles or combinations of vehicles having brakes on all wheels	30	14
Vehicles or combinations of vehicles not having brakes on all wheels	40	10.7

(Ga. L. 1953, Nov.-Dec. Sess., p. 556, §115; Ga. L. 1982, p. 3, §40; Code 1933, §68E-304, enacted by Ga. L. 1982, p. 165, §4; Code 1981, §40-8-53, enacted by Ga. L. 1982, p. 165, §10).

40-8-54. Maintenance.

All brakes shall be maintained in good working order and shall be so adjusted as to operate as equally as practicable with respect to the wheels on opposite sides of the vehicle.

(Ga. L. 1953, Nov.-Dec. Sess., p. 556, §115; Code 1933, §68E-305, enacted by Ga. L. 1982, p. 165; §4; Code 1981, §40-8-54, enacted by Ga. L. 1982, p. 165, §10.)